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ABSTRACT

This paper focuses on the federal Freedom of Information Act (FOIA) and analyzes the possibilities for interpretation or amendment of the act in order to secure preferential treatment for the press, with regard to access to information. After briefly examining the manner in which special-access claims have been treated by the courts, the paper considers the implications of the release of information "in the public interest." Suggested amendments to the act include making documents available to the press without charge (thus eliminating agency discretion in the matter); awarding attorney fees and other litigation costs when the press's case prevails in an FOIA suit, with the cost to be borne by the recalcitrant agency; shortening the time during which agencies must act on requests for information; and treating the press differently than other requestors. Overall, however, interpretation of the FOIA to afford special status to the press seems unlikely on any large scale. Amendment of the act to achieve such ends is equally unlikely, since the FOIA was overhauled in 1974, with the needs of the press in mind. In any case, constitutional recognition of a right of special press access is preferable to any statutory privilege. (Author/KS)

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ACCESS TO INFORMATION: SPECIAL STATUS FOR THE PRESS UNDER THE FOIA?

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ACCESS TO INFORMATION: SPECIAL STATUS FOR THE PRESS UNDER THE FOIA?

CBS newsman Daniel Schorr's recent involvement with secret government information[1] has done more than raise again the thorny problems surrounding "journalism ethics."[2] The episode implicates in extreme fashion the "right of the public to know," and, more specificially, the right of access to government records by the public and the press.

These issues have serious constitutional overtones, but, for the moment at least, the Supreme Court has not completely answered the first amendment questions. Although the Court has spoken of the right of the public to know about matters of public concern,[3] it has not defined the parameters of that right. In late May the Court struck down a state statute prohibiting the advertising of prescription drug prices, and this decision could have an impact in the "right to know" area.[4] The narrower question of access for the press was resolved -- apparently -- in two 1974 companion cases, Pell v. Procunier[5] and Saxbe v. Washington Post Co.,[6] which elaborated upon standards outlined in the landmark case of Branzburg v. Hayes.[7] Stating in all three cases that newsmen "have no constitutional right of access . . . beyond that afforded to the general public,"[8] the Court for the present has limited any constitutional right of press access to that of the public at large. Put another way, the first amendment mandates no special right of press access to information. However, the Court has merely defined one unknown in terms of another,[10] and, more significantly, has not yet had to face the situation in which press and public are completely denied access.[11] In Pell and Saxbe, alternative means of access existed for the press.[12]

When presented with the more complex case, the Court may well have to recognize a limited right of special access for the press, on the theory that while certain settings present administrative problems making general public access impossible, those difficulties are "insufficient to compel exclusion of a manageable number of professionals who could disseminate information to the general public."[13] That day has not yet dawned in the Court, and until it does the press must look elsewhere for special access to government information. The logical starting point is the federal Freedom of Information Act;[14] this paper focuses on whether the FOIA can be either interpreted or amended so as to secure preferential treatment for the press.[15]

I. ACCESS TO RECORDS -- THE PUBLIC AND THE PRESS

Courts generally have looked unfavorably upon assertions of a special first amendment right of press access to documents and reports not publicly available, even though the first amendment encompasses the right to receive information.[16] Both state and federal courts cling to the notion that "the Constitutional privilege of freedom of the press does not include a right on the part of the representatives of the press to inspect documents not open to members of the public generally."[17]

When non-constitutional rights of access were asserted by the press, courts usually found that the newsmen had the special interest or proper purpose required under the common law or statute.[18] However, access was generally denied where courts determined that the records sought were not public.[19] More recently, of course, the press has sought and obtained documents under federal and state "freedom of information" acts.[20] At least one court faced with a statutory access claim addressed the issue in constitutional terms, although the first amendment was not the basis for determining access:

> We are confronted here by alleged improprieties by public officials, or private citizens paid with public funds, and if these misdeeds were perpetrated, the public has a right to know about them. While this case is not, as we have noted, the classic case of prior restraint, it approaches it.[21]

Apparently the first reported case of a newspaper claiming a first amendment right of access was Providence Journal v. McCoy.[22] City officials denied the Journal access to certain tax records, acting under authority of an ordinance forbidding examination of records without approval of the city council and a resolution allowing a rival newspaper to view the documents. The federal district court held that the ordinance and resolution violated the first amendment by preventing publication and denied equal protection by permitting access to the public and a rival publication while forbidding access to the Journal. The First Circuit affirmed solely on the equal protection ground.

Eight years later, in 1959, a newsman sought an injunction against officials of the United States Senate, seeking a court order allowing him to inspect Senate payroll records and other government financial documents. The federal court denied his first amendment claim in Trimble v. Johnston,[23] stating that freedom of the press does not include a right of the press to inspect documents not open to members of the general public.[24] In a 1973 case, McMullan v. Wohlgemuth,[25] the Philadelphia Inquirer requested permission to examine state welfare department lists of names and addresses of welfare recipients in Philadelphia and the amount of assistance they received. Permission was denied, and the paper brought an action on the common law, the state's information statute,[26] and the first amendment. The Supreme Court of Pennsylvania found both the common law and the statute in applicable and recognized that a first amendment right to gather news exists, although it is not absolute. However, the Court emphasized that the "right of the press should [not] be given wider boundaries than that of the public it seeks to inform,"[27] and concluded that the paper's interest in the information was outweighed by the privacy interest of those receiving welfare.

Thus, when dealing with first amendment claims, courts are fond of asserting that the right of the press is merely coextensive with that of the general public and that no special right of access for the press exists. What, then, is the right of the general public? Courts apparently have been unable to locate any constitutional right of the public to gather information, if indeed it exists. However, since the Supreme Court has stated that the right of the press to gather news is "not without its First Amendment protections"[28] and that such a right is not "beyond that afforded to the general public,"[29] it follows that at least some sort of public constitutional right exists.[30] Moreover, a public right to acquire information was at issue in decisions in which the Court interpreted the first amendment as including a right to receive information, suggesting that a public right may exist.[31] In addition, the Court has recognized a right to receive information in cases where the source of the information had no right of expression.[32]

However, no court on either the federal or state level has explicitly declared a first amendment public right of access to government records.[33] Neither the courts nor Congress has recognized an affirmative constitutional duty on the part of the government to disclose,[34] and Justice Stewart has stated that there "is no constitutional right to have access to particular government information. . . . The Constitution is [not] a Freedom of Information Act. . . ."[35] That is not to say that the judiciary has not hinted at the existence of such a right, as the courts have often spoken of the right of the public to know about matters of public concern.[36] Recent federal district

court decisions involving the press suggest that the public also has a first amendment right of access.[37] Of these cases, the strongest is perhaps Quad City News Service Inc. v. Jebens,[38] in which reporters for an "underground" newspaper were denied access to police department files, records, and investigative reports. Regarding the paper's claim under the Iowa freedom of information act,[39] the court made clear that the defendant's practice of making available investigative records to news media personnel while not permitting access to other citizens is unsupported by the statute.[40] The court echoed that language when considering the first amendment/equal protection claim, stating that "Quad City is entitled to the same right of access as other citizens."[41] Lewis v. Baxley,[42] a case involving press access to a state legislature, also recognized a right of public access, although the court in dictum determined that a special press right, albeit a limited one, would allow the press access in situations where the public is excluded.[43]

On the statutory and common law level, the public fares considerably better, although the early cases following the English common law rule were adverse to public access. Under the strict rule, only persons who had a direct interest in the records were given the right to inspect them, and inspection could be denied if a court found the public interest would suffer.[44] Although subsequently relaxed somewhat, the rule became the basis for the disclosure provisions of the federal Administrative Procedure Act of 1946, which provided that only "properly and directly concerned" persons were entitled to access and that agency officials could withhold information "requiring secrecy in the public interest."[45] Well before the passage of the Act, a federal court denied a citizen's common law right of access to government documents.[46]

Under the federal Freedom of Information Act,[47] "any person" can obtain non-exempted government records.[48] Most state information laws also provide for access to "any person" or "any citizen," as the common law "standing" requirements have been largely discarded.[49] However, after the federal act had been in operation three years, Ralph Nader charged that it had been "forged into a shield against citizen access" and that the public was neither using the Act nor benefiting from it.[50] Shortly after the Act was passed, Professor Kenneth Culp Davis predicted that lawyers and their clients would be the Act's principal beneficiaries.[51]

II. THE STATUTORY ISSUE -- CAN THE FOIA BE INTERPRETED OR AMENDED SO AS TO SECURE SPECIAL TREATMENT FOR THE PRESS?

A. Statutory Interpretation

Ironically, the press has not benefited greatly from passage of the FOIA. For example, between July 4, 1967, and July 4, 1971, nearly 255,000 requests for information were made under the FOIA, but only 90 came from the news media.[52] Requests by corporations and private law firms exceeded by three-fold the aggregate of requests from the news media, public interest groups, and researchers,[53] bearing out Professor Davis' prediction noted above.[54] He also forecast that the press, the primary political force behind the Act, would benefit only slightly.[55]

Disappointment was expressed at 1973 House hearings that the press had not found the Act more useful, but newsmen claimed that the disclosure process was too slow and expensive to meet their needs and deadlines.[56] The ephemeral nature of news precludes a wait of several weeks or months for an administrative decision regarding release and possibly an ensuing court battle,[57] and many news organizations cannot afford lengthy litigation. Indeed, it has been estimated that even the simplest FOIA case involves legal expenses of more than $1000, bringing

about the distinct possibility that only the most affluent organizations might decide to challenge the government in court.[58] The 1974 amendments to the FOIA sought to alleviate these problems, as Congress added provisions requiring agencies to act upon requests for information within ten working days of receipt,[59] expediting appeals,[60] and allowing courts to assess against the government reasonable attorney fees and other litigation costs in cases where "the complainant has substantially prevailed."[61] Despite these changes, which may not be particularly helpful to the press, another problem remains: even if a request or lawsuit is successful, the information disclosed is not the exclusive property of the news organization that brought suit and is available to its competitors.[62]

The press has brought several successful suits under the Act[63] and also has been able to obtain information under the statute without going to court.[64] In addition, three highly-publicized disclosures in 1974 showed that the FOIA can be effective in terms of unearthing "public interest" information: Atomic Energy Commission documents, suppressed for ten years, revealing a scientist's opinion that a major nuclear reactor accident might kill 45,000 people and create a disaster area the size of Pennsylvania;[65] details of the My Lai massacre released by the Army;[66] and IRS documents concerning surveillance of "leftist" organizations.[67]

The unequivocal language of the FOIA seemingly would preclude interpretation creating special treatment based upon the status of the person requesting the information. Section 552(a)(3) provides that upon request agencies "shall make the records promptly available to any person." Particularly significant is the fact that this language replaced a provision in the original Administrative Procedure Act of 1946 that allowed disclosure "to persons properly and directly concerned."[68] The predecessor statute also provided that information "requiring secrecy in the public interest" would be exempt from disclosure and allowed withholding of information "held confidential for good cause found."[69]

All parties are equal in satisfying the words "any person," the use of which apparently precludes any inquiry into the purposes of the particular party seeking the information.[70] The legislative history underscores the notion that "any person" does in fact mean any person:

> S. 1160 would . . . provide a true Federal public records statute by requiring the availability, to any member of the public, of all the executive branch records described in its requirements, except those which are within nine stated exemptions.71

> [The Act] eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what the government is doing. There is, of course, a certain need for confidentiality in some aspects of government operations; but outside these limited areas, all citizens have a right to know.72

The courts have not overlooked this legislative purpose. The Supreme Court has stated that the purpose of the FOIA is "to open administrative processes to the scrutiny of the press and the general public."[73] And in a widely-cited case, the District of Columbia Circuit said that by "directing disclosure to any person, the Act precludes consideration of the interest of the party seeking relief."[74] Perhaps the strongest language appears in two footnotes in Hawkes v. IRS,[75] a 1972 Sixth Circuit decision:

> Access to material under the Freedom of Information Act is not limited to those with a particular reason for seeking disclosure. Instead the

> material is available to "any person." [citation omitted]. Thus though the practical utility of the information to Hawkes may have diminished significantly . . . , he still retains the same right to seek the desired information as that possessed by any other person under the terms of the statute.76
>
> Such exemptions as are allowed in the Act are based on the nature of the material sought--not on the identity or status of the seeker.77

However, at least one case suggests that courts may be willing to consider the status of the person seeking the information. In Wine Hobby USA Inc. v. IRS,[78] a corporation engaged in the business of manufacturing and distributing amateur winemaking equipment and supplies sought the names and addresses of all persons in the Mid-Atlantic region who had registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use. These amateur winemakers are required to file a form with the Bureau in order to claim exception from various federal permit, bonding and tax requirements.[79] Wine Hobby admittedly wanted the names and addresses of registrants to enable the company "to forward catalogues and other announcements to these persons regarding equipment and supplies that [the company] offers for sale."[80]

The district court reluctantly concluded that despite the potential for abuse, the names and addresses were required to be disclosed, stating that "we are precluded from considering the needs of the party seeking relief. The fact that the plaintiff is motivated by personal economic gain in the promotion of its product is considered by the court to be of no significance and we are precluded from its consideration."[81] The court added that access to material under the FOIA is not limited to those persons with particular reason for seeking disclosure.[82]

The Third Circuit reversed, determining that exemption 6 of the Act[83]--the "clearly unwarranted invasion of personal privacy" exemption--necessarily requires the court to balance a public interest purpose for disclosure of personal information against the potential invasion of individual privacy.[84] In striking such a balance in favor of nondisclosure of the names and addresses, the court noted that "the sole purpose for which Wine Hobby has stipulated that it seeks the information is for private commercial explitation."[85] The court added:

> Wine Hobby advanced no direct or indirect public interest purpose in disclosure of these lists and indeed, we can conceive of none. The disclosure of names of potential customers for commercial business is wholly unrelated to the purposes behind the Freedom of Information Act. . . .86

The court, then, ignored the "any person" provision and reverted to the pre-FOIA "public interest" test, at least in the context of determining whether disclosure would constitute a clearly unwarranted invasion of personal privacy under exemption 6. This approach was first formulated in Getman v. NLRB[87] and has been generally followed; a head count among the circuits puts the balancing formula in the favored position by a 3-1 margin,[88] which suggests that the press might make use of such analysis when agencies seek to withhold information under exemption 6. [The Supreme Court has recently approved the balancing formula in exemption 6 cases. See Department of the Air Force v. Rose, 44 U.S.L.W. 4503 (April 21, 1976).]

A recent non-FOIA case indicates that the press might be more successful than a purely commercial enterprise. (Of course, the news media--with the exception of public broadcasting--are also commercial concerns, but their activities are constitutionally protected.[89]) In United States v. Mitchell,[90] television and radio

newsmen requested copies of former President Nixon's White House tapes, which were played to the jury in the criminal Watergate case. The court, over Nixon's objection, held that the tapes would be available to the news media for copying, but emphasized that safeguards were in order: "It is a prerequisite to any [recording] plan that commercialization of the tapes or any undignified use of the material be minimized."[91]

Thus, when the press brings suit to force disclosure after an agency has withheld information on the basis of exemption 6, the press might be able to make a successful public interest argument under the balancing formula outlined above. Under the Mitchell court's reasoning, the press apparently is imbued with considerably more "public interest" than a corporation engaged in "commercial exploitation." However, there is a corresponding increase in the privacy interest on the other side of the balancing equation when the press replaces the corporation. In Wine Hobby the court couched the privacy interest primarily in terms of the registrants' receipt of unsolicited mail.[92] The court also noted other consequences that would flow from the release of names and addresses, such as disclosure of information regarding personal activities within the home (i.e., wine making) and facts about the family status of the registrant.[93] It seems rather obvious that such disclosure would have even more serious consequences in terms of invasion of privacy in cases where the press sought and obtained information, since the news media have the capacity for rapid dissemination of information. For example, the Associated Press could transmit a person's name and background across the country in a matter of minutes. Is this not a greater invasion of privacy than a person's receipt of unsolicited mail at home? On the other hand, the publication of one's name might be less of an invasion than the active solicitation of one's dollar by a commercial concern.

Courts have not been helpful in defining what constitutes a "clearly unwarranted invasion of personal privacy" under exemption 6.[94] But the balancing test adopted by the courts in such cases as Getman and Wine Hobby suggests that the status of the person seeking the information is in large part determinative of whether the invasion is unwarranted. For example, the Wine Hobby court found that disclosure for "commerical exploitation" was an unwarranted invasion and therefore does not fall within the exemption. In other words, any invasion of privacy would be outweighed in the balancing formula, as disclosure would not constitute a "clearly unwarranted" invasion of privacy.

The Second Circuit in the Rose case adopted a similar balancing formula, but considered the public interest in obtaining the information rather than the status of the person seeking it or the purposes for which he intended to utilize it.[95] The variation seemingly makes little difference in determining whether the invasion of privacy is warranted or unwarranted, insofar as the press is concerned. For example, under the Getman/Wine Hobby analysis, the press could argue that its purpose in seeking the information was a noble one -- informing the public. Under the Rose test, the press could claim that release of the information being sought would be in the public interest. In either case, the press' argument would be that disclosure would not constitute an unwarranted invasion.

One court has rejected a balancing approach, construing the FOIA to prevent any inquiry into the purpose asserted by an individual plaintiff. In Robles v. EPA,[96] the Fourth Circuit held in favor of the plaintiffs, who were seeking disclosure by the EPA of results of a survey of homes and public buildings tested for radioactive emissions, including the names and addresses of the occupants. Quoting Professor Davis, the court stated that the interests of the requestors and the need of the public to be informed have nothing to do with the personal privacy involved.[97] The Robles test, which involves only a determination of whether the privacy invasion is "clearly unwarranted" and not a consideration of status, purpose, or public interest, is less favorable to special press treatment, but it is clearly the minority view among the circuits,

and post-Robles decisions have adhered to the balancing approach.[98] [Moreover, the Supreme Court affirmed the Second Circuit's decision in Rose, utilizing a balancing approach.[99]]

The press also might claim special treatment under exemption 4 of the FOIA by utilizing the type of analysis described above in connection with exemption 6. Exemption 4 excludes from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[100] The courts have consistently held that the exemption does not apply to information which does not satisfy all the requirements stated in the statute.[101] Thus, trade secrets are clearly exempt, as is commercial or financial information which is obtained from a person and privileged or confidential. Unfortunately, neither the statute itself nor the Senate and House reports[102] clearly define "privileged or confidential." Although litigation has not required the courts to define "privileged," the recurrent problem of defining "confidential" has proved troublesome.

Early decisions adopted a broad definition of "confidential," including within its scope any material for which the informant had requested or the agency had offered confidentiality.[103] Subsequent District of Columbia Circuit cases held that the information was confidential if it was of a type which would "customarily not be released to the public by the informant."[104] Formulating a different standard in National Parks & Conservation Ass'n v. Morton,[105] the District of Columbia Circuit held that information is confidential for purposes of exemption 4 only if disclosure would either "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[106] This formulation is clearly superior to the earlier efforts, under which information necessary to the public interest or press studies of agency dealings with private businesses might be withheld, even if no adverse consequences of disclosure could be shown.[107] Under the National Parks test, disclosure is apparently necessary in situations in which agencies can require the submission of customarily private business information that would not cause competitive harm if released--such as when the data comes from federally regulated monopolies.[108] It seems that a considerable amount of information could be withheld, however, because customary business confidentiality is often based on dangers of competitive harm that would attend disclosure. Even where no competitive harm is likely, the release of such information would inhibit businesses from providing the data voluntarily.[109] Subsequent cases have adhered to the National Parks test, and the District of Columbia Circuit has added a helpful clarification: a promise of confidentiality in and of itself will not defeat the right of disclosure under the FOIA. Thus, if the National Parks test is not met, the material must be disclosed on request even if it were submitted in confidence.[110]

The press can make two different arguments regarding information supposedly exempt under exemption 4. The first is that the information is required to be submitted to the government and is not of such a nature as to be harmful to the business' competitive position. In such a case, the material would be disclosable because there would be no danger of competitive harm and no danger that the business would be inhibited from providing the information, since the information was not submitted voluntarily. That the information was furnished in confidence is immaterial. However, the press alone would not be the sole beneficiary of such analysis--the status of the requestor and his purposes would be irrelevant.

The second argument speaks to special treatment for the press. Even if there is potential for competitive harm, the press should be able to obtain the information because it will not utilize the data in such a way as to gain competitive advantage over the company that submitted the information. For example, assume that a competitor and a newspaper are seeking the same information under the FOIA, and the government withholds disclosure under exemption 4. Assuming that the information is required to be submitted to the government (so as to avoid the

possibility that disclosure to anyone might dissuade the business from furnishing the data), the press could argue that its use of the information would not result in competitive harm because it would use the material in a general fashion. A competitor, on the other hand, would carefully analyze the information in order to find out as much as possible about its business adversary.[111] In short, the press could claim that disclosure to the news media would not cause harm to one's competitive position, while disclosure to a competitor would bring about such a result.[112]

In addition, the press could take the position that "confidential" under exemption 4 is roughly the same as "personal privacy" under exemption 6. Although this argument apparently has not been made in reported cases, it seems plausible since the interests being protected by each exemption are similar. If similar analysis is used, the courts would balance the interests of the business in keeping the material confidential with the interests of the requestor in obtaining the data.[113] Again, the status of the requestor would become relevant to such balancing, and the press would rely on its role as a "public interest" institution.

A provision added to the FOIA in 1974 lends some support to a theory that the press might be accorded special treatment under the Act. Section 552(a)(4)(A) requires each agency to promulgate a uniform schedule of "reasonable" fees limited to the direct cost of document search and duplication. It is also provided that "[d]ocuments shall be furnished without charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

This fee waiver provision is significant, particularly in terms of the cost problems noted previously. The Administrative Conference of the United States conducted a study on agency implementation of the FOIA and found that copying charges ran from five cents a page at the Department of Agriculture to one dollar a page at the Selective Service System, while clerical search charges varied from three dollars an hour at the Veterans' Administration to seven dollars an hour at the Renegotiation Board.[114] And, of course, there are the "horror stories" -- the Department of Agriculture presenting one requestor an $85,000 bill, the Food and Drug Administration requiring payment of $20,000 for a preliminary search without even knowing which documents existed.[115] Moreover, there were complaints from citizens who had been charged search fees and photocopying costs for information that an agency made freely available to its "regular" clients.[116]

The fee waiver/reduction provision was not contained in the original House version of the bill, but was a Senate creation. The Senate bill contained other provisions as well: the director of the Office of Management and Budget was to promulgate uniform fee schedules, and no fees would ordinarily be charged if the person requesting the records were indigent, if such fees were less than three dollars, if the records were not located by the agency, or if the records were determined to be exempt from disclosure.[117] The conference committee substitute dropped these provisions, although it retained the discretionary "public interest" waiver authority. The conference report stated:

> By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in these categories. Rather, they felt such matters are properly the subject for individual agency determination. . . . The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.[118]

In general, the legislative history indicates that the major concern of the Congress was that "exaggerated search charges and extravagant charges for legal time can provide effective obstacles to public access to government information."[119] The cost factor seemed to be foremost in Congress' mind, as also reflected in the provisions regarding court costs and attorney fees.[120] There is no hint

in the legislative history that the fee waiver provision was designed primarily for the press' benefit; indeed, the Senate version of the bill specifically provided for waiver in the case of indigents. While Senate debate reveals that the needs of the press were expressly considered in relation to provisions expediting the handling of requests for information,[121] there is no mention of the press in discussion of the fee waiver subsection. Congress clearly intended the "public interest" standard to be liberally construed,[122] but there is no indication that "public interest" means "press"---the term could just as easily refer to public interest research groups, for example.[123] Moreover, the term "public interest" may merely refer to categories of records rather than to the status of the person or group seeking the records. Although no cases have yet arisen under the fee waiver provision, the District of Columbia Circuit has discussed "public interest" in terms of categories of records:

> [The FOIA] sets up workable standards for the categories of records which may be exempt from public disclosure, replacing the phrases "good cause found" [and] "in the public interest". . . with specific definitions of information which may be withheld.124

Thus, an argument that the fee waiver provision mandates special treatment for the press is somewhat spurious, although it is clear that the press may indeed benefit from the provision. In fact, an argument can be made that the press always, by definition, meets the "public interest" requirement and is thus always entitled to a fee waiver. This, however, is not to say that the fee waiver provision singles out the press for special treatment, as other groups--such as indigents, researchers, and public interest organizations--also appear to qualify for fee waiver or reduction.

It seems clear from the foregoing that courts would be hard-pressed to interpret the FOIA so as to provide preferential treatment for the press, except perhaps in the exemption 6 context. In that area alone, the courts have looked to the status of the requestor and his purposes, despite the Act's language that disclosable information shall be available to "any person." As the Sixth Circuit has stated in another context, the FOIA "conveys no discretionary power to vary the standards established in the law itself."[125] However, as illustrated by the exemption 6 situation, possibilities do exist for statutory interpretation favorable to a special press privilege.

B. Possible Amendment

As a practical political matter, the press may have a difficult time persuading Congress to amend the FOIA so soon after the 1974 amendments. As the legislative history of those amendments makes clear, Congress was well aware of the problems faced by the press under the Act,[126] and apparently no consideration was given to creating a special privilege for the news media.

Any change in the FOIA to facilitate press access seemingly would focus upon the "any person" provision in section 552(a)(3), perhaps creating special rights of access for the news media in particular contexts. Two problems come immediately to mind: is such a scheme constitutional, and does it create insurmountable problems in determining who qualifies as "press" for purposes of the special access? Before these questions are considered, state information acts are examined for any light-shedding experience with such a classification scheme.

Apparently only one state--New York--has seen fit to carve out a special status for the news media. The New York information statute[127] expressly provides that names, addresses, titles, and salaries of agency employees (except those of law enforcement personnel) shall be made available to "bona fide members of the news media upon written request."[128] In addition, the Act further distinguishes

among persons requesting information by distinguishing among the purposes for which the information is sought. Section 88-3(d) prevents the "sale or release of names or addresses in the possession of any agency or municipality if such lists would be used for private, commercial, or fund-raising purposes."[129] This latter provision is not unique, however, as a similar requirement is embodied in Pennsylvania's welfare code, which provides that names and addresses of welfare recipients cannot be released if the information is to be used for commercial or political purposes.[130]

Most state information acts provide for access by "any person,"[131] "any citizen,"[132] or "any citizen of the state."[133] Moreover, this issue of eligibility to obtain access to information apparently is controversial. For example, arguments to limit provisions of the Texas Open Records Act[134] to those who could certify that they would use the information only for noncommercial purposes occupied a great deal of legislative debate. This attempt failed, as did an effort to limit access to Texas residents.[135] The issue of who is entitled to access has arisen in two Texas cases, one involving a commercial firm, the other a newspaper. In Texas Industrial Accident Board v. Industrial Foundation of the South,[136] the Texas Court of Civil Appeals did not decide whether the legislature intended to make claims of injured workmen filed with the accident board available for "commercial exploitation" by a private corporation. Houston Chronicle Publishing Co. v. City of Houston[137] involved a request by the Chronicle for portions of police offense reports not disclosed to the press, arguing a statutory and constitutional right of access. The Court of Civil Appeals ruled that portions of the records were available under the state open records act, but also held that certain information contained in those reports must be disclosed under the first amendment. In construing the statute, the court made no distinction between the press and the general public, and noted in its discussion of the constitutional issue that "whatever we hold to be available to the press must also be available to the public." The Texas Attorney General, who plays a major role in interpreting the Act, has ruled that "the Open Records Act is a general public disclosure statute giving any person access to governmental records without reference to his particular circumstances, motive or need."[138]

Virginia once had the most unusual eligibility provision. Its original information statute allowed inspection and copying of records by any Virginia citizen "having a personal or legal interest" in the records and by "representatives of newspapers published in this State, and representatives of radio and television stations located in this State."[139] Subsequent amendments[140] revamped the statute, which presently allows access to any citizen of the state and representatives of newspapers and magazines with a circulation in the state and representatives of radio and television stations broadcasting in or into the state.[141]

No cases providing interpretation arose under the original Virginia statute, and New York courts have not had occasion to interpret the press access portion of that state's statute.[142] However, the Committee on Public Access to Records, created pursuant to section 88-9(a) of the New York act, has rejected any concept of preferred treatment:

> RESOLVED, That information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest.143

The significance of this resolution is unclear; the act only empowers the Commission to issue guidelines, advisory opinions, and regulations.[144]

State experiences, therefore, provide little help regarding special treatment for the press under open records statutes. However, it should be noted that apparently only New York creates such a statutory privilege for the news media, and that only in a narrow area. The New York statute also includes use of names

and addresses for "private, commercial or fund-raising purposes" within its definition of "unwarranted invasion of personal privacy."[145] Apparently release of information to the press would not constitute such an invasion. However, in a Pennsylvania case arising under a similar statutory provision, the state supreme court refused access to the press.[146]

1. Constitutionality

Of course, if a first amendment right of special press access is found to exist, special treatment for the press under the FOIA would be constitutionally mandated. In the absence of such a right, the question becomes whether a statutory privilege would be constitutional. Since the Supreme Court has intimated that the constitutional right of the press is coextensive with that of the public, the issue is whether it is constitutionally permissible to grant access to the press while excluding the public. As noted previously, the Court, by equating the press' right of access with a public right, has defined one unknown in terms of another.[147] The boundaries of the public right to information have remained largely undefined, making the scope of the press' right equally unclear.

If the public's right is precisely the same as the press' right, it could be argued that special statutory treatment for the press would be a violation of equal protection, at least so far as state acts are concerned. On the federal level, the equal protection clause of the fourteenth amendment is inapplicable, as it is directed solely at the states. The fifth amendment, which is applicable to the federal government, does not contain an equal protection clause, although, of course, it does contain a due process clause. The Supreme Court has faced this problem before, most recently in the context of sex discrimination. In Weinberger v. Wiesenfeld[148] the Court said:

> This Court's approach to Fifth Amendment equal protection has always been precisely the same as to equal protection claims under the Fourteenth Amendment.[149]

The most frequently cited language comes from Bolling v. Sharpe,[150] a companion case to the landmark Brown v. Board of Education.[151] In Bolling Chief Justice Warren wrote:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[152]

Thus, in cases involving the federal government rather than a state, the courts have applied equal protection criteria.[153] The question then becomes: which equal protection test is applicable?

Under the so-called "traditional equal protection" analysis, courts will uphold a law distinguishing between classes or groups if there is any reason or rational basis for the law and its distinctions.[154] However, where the classification touches upon a fundamental right, its constitutionality must be judged by a more strict standard -- whether it promotes a compelling state interest.[155] When first amendment interests are implicated, courts will employ an active standard of review in scrutinizing the classification scheme.[156]

If the public has a cognizable first amendment right of information gathering, it is arguable that an amendment to the FOIA creating special access

for the press must meet the "compelling interest" test. Consider, for example, the situation in which a private corporation seeks information that is disclosable to the press because of such a "special press access" amendment but is not available to any other requestor. The corporation would argue that the "compelling" standard should be applied because the public's first amendment access right is implicated. And while any number of "rational" justifications could be offered under the "rational basis" test,[157] it is doubtful that any of these rationales rise to the level of "compelling." In cases dealing with the press' right, the "compelling interest" standard has proved difficult to meet.[158] Indeed, the test is virtually insurmountable no matter what the context in which it is applied.[159] Moreover, numerous arguments that no special right should flow to the press constitute an additional barrier. For example, one writer has argued that a special press privilege would create an unjustified risk of inhibition of information flow resulting from disclosure only to a select group.[160] It also has been contended that the press has no special sophistication to determine which materials should be "passed on" to the general public and that a special press right could induce the press to assume an undesirable self-censorship role which runs counter to the objective of achieving a free flow of information.[161] Using such an approach, any statute creating special access for the press would seemingly fall under the "compelling interest" criterion; the argument, however, seems seriously flawed.

First, the compelling interest standard is generally applied only in situations in which a statute impinges on fundamental rights.[162] In the case of a special right of press access, there is no impingement whatsoever on the constitutional access right of the public, whatever that right may be. In other words, statutory creation of special access for the press does not eliminate the public's constitutional right of access; enhancement of the press' right does not impinge upon the public's right. Consider these three situations:

(1) The FOIA is amended to require agencies to respond to press inquiries within 24 hours, while retaining the present 10-day period for all other requestors;

(2) The FOIA is amended to allow certain confidential material to be disclosed to the press but not to the general public;

(3) Congress establishes special press galleries equipped with telephones, typewriters, and the like.

Of course, with regard to the third situation--which already exists--no one has seriously argued an equal protection violation. Even though greater access is created for the press, the public is not denied its constitutional right of access. The same is true for the other situations; in the first, the public still has access to the information, and in the second, the public had no right to the material under its constitutional right of access.

Looking at the problem from a slightly different angle, it is clear that any special press access granted by statute merely goes beyond the minimum right of access required by the first amendment. According to Branzburg, Pell, and Saxbe, the constitutional rights of access of the press and public are the same; an amended FOIA would go beyond this minimum and establish greater access for the press. The Supreme Court has, in other contexts, held that legislation extending constitutional rights involves no equal protection problem. In Katzenbach v. Morgan[163] the Court upheld a portion of the Voting Rights Act of 1965 that provided that no person who has successfully completed the sixth grade in an American school in which the predominant language is other than English shall be disqualified from voting under any literacy test.[164] The statute was upheld even though it singled out a specific group--Puerto Ricans in New York--for special treatment. Voting rights were again at issue in McDonald v Board of Election,[165] in which unsentenced jail inmates challenged the constitutionality of Illinois' failure to include them in a class entitled to vote absentee. Finding no equal

protection violation, the Court said: "That Illinois has not gone further, as perhaps it might, should not render void its remedial legislation, which need not . . . 'strike at all evils at the same time.'"[166] Under such an approach it seems clear that an amendment to the FOIA creating a special access for the press would clearly pass equal protection muster. Even if the Katzenbach/McDonald analysis is not utilized, it seems certain that an amendment would withstand the "rational basis" test,[167] as the "compelling interest" test is inapplicable. Of course, the equal protection problem vanishes if the press has a constitutional right separate and apart from that of the public, or if the press and the public have no right at all.[168] If the latter is the case, a special press statutory privilege would be subject to the "rational basis" test and would undoubtedly pass with flying colors.

2. What is "The Press"?

Assuming that a statutory press privilege could be constitutionally created, a fundamental difficulty would arise: defining "press" in order to determine who qualifies for the privilege. (Of course, the same difficulty arises if a constitutional right of special press access exists.) Concomitant with the definitional problem is the potential danger of discrimination against certain kinds of media organizations and reporters, most notably the less conventional segments of the press.

As Professor Vince Blasi has demonstrated, the danger is very real in regard to state shield laws, which are fraught with similar definitional hazards.[169] Shield laws often have been interpreted strictly as courts have denied protection to journalists. For example, in 1964 a federal court construed the California newsman's privilege statute to requrie a magazine reporter to reveal his sources during the course of a libel suit. The statute extended the shield's protection only to persons employed by or connected with newspapers, press associations, wire services, radio stations or television stations. Since neither "magazine" nor "periodical" appeared in the statute, the reporter was required to reveal his confidential source.[170] The case of Earl Caldwell, the newspaper reporter whose first amendment claim to source confidentiality was rejected in Branzburg, also is illustrative. The district court held that the first amendment afforded Caldwell a privilege to refuse disclosure of confidential information until the government made a showing of a "compelling and overriding national interest" in the testimony.[171] Shortly thereafter, the same district judge found such an "overriding national interest" in the testimony of two reporters for the newspaper Black Panther on the basis of broad allegations seemingly no different from those which were held insufficient to justify compelling the testimony of Caldwell, who works for the New York Times.[171]

Despite these problems, half the states have adopted shield laws, and a uniform state act has been drafted, reflecting perhaps recognition of the notion that source confidentiality is worth protecting, definitional difficulties to the contrary. Further, it is suggested that even if the danger of discriminatory administration of a defintional statute is pervasive, the situation under which such a statute would be far superior to "the inequality and unfairness that now characterizes the scramble for news."[173] The same could be said in regard to defining "press" for access purposes, since, as a practical matter, "the government is already defining the categories of newsmen eligible for police press passes, admission to legislative galleries, and access to certain official documents."[174] For example, reporters for the Los Angeles Free Press, a less-than-conventional newspaper, were denied press passes by the police and sheriff's departments on the ground that the Free Press did not report fire and police news, instead printing articles focusing "largely on sociological considerations." A California court rejected the paper's claim that it had been denied equal

protection.[175]

It seems, therefore, that any definitional problems presented by a statute creating preferential press access would be no more overwhelming than those presently existing in terms of shield laws or accreditation of newsmen. In addition, significant privileges are created for the press in other areas, such as the cheaper second class postage rate[176] and state statutes requiring certain notices to be printed in "legal" newspapers.[177] Any disadvantage that may result because of the access privilege--whether it be statutory or constitutional--must be measured against the obvious advantages that the privilege would foster, both in terms of the press and society as a whole.[178]

3. Suggested Amendments

There appear to be two alternative routes regarding amendment of the FOIA so as to afford the press preferential treatment. The first, and most obvious, would be to eliminate the term "any person" from the Act, replacing it where appropriate with two broad categories: "members of the public" and "members of the press." The second alternative, more subtle than the first, would involve leaving intact the "any person" language and creating special provisions which would apply only to the press--for example, "agencies shall respond to all requests for information made by members of the press within 24 hours." The second method seems preferable, if only because it is the less overt of the two. This factor is significant because the legislative history of the FOIA indicates that Congress was strongly committed to the notion that information should be available to "any person."[179] It seems that amendments carving out small "exceptions" favoring the news media would be more likely to pass Congress than would amendments chopping away at the "any person" language and creating various categories of persons entitled to disclosure.

Five amendments, all based on issues dealt with previously in this paper, would be of benefit to the press. The first two involve the cost factor, as expenses incurred in obtaining government information have inhibited the press' utilization of the Act; the third involves the time factor, an area of obvious importance to the deadline-conscious news media; and the final two concern exemptions to the Act and would allow material falling within these exemptions to be released to the press.[180]

(1) Fee Waiver. Section 552(a)(4)(A) provides that agencies may, at their discretion, furnish documents without charge or at a reduced charge "where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." A more helpful provision for the news media would make fee waiver mandatory when the requestor is a member of the press; in fact, it might be made mandatory in other contexts as well, such as when the requestor is a member of a public interest research group. One sentence would make the change: "As release of information to the press is in the public interest, agencies shall furnish documents without charge to the news media."

(2) Litigation Costs. Section 552(a)(4)(E) of the FOIA gives the federal courts discretion to assess against the government reasonable attorney fees and other litigation costs in cases "in which the complainant has substantially prevailed." A provision making such awards mandatory in cases in which the press has prevailed would perhaps encourage the news media to make greater use of the Act, and, on the other side of the fence, might make agencies more responsive to press requests for information. If the agency has to pick up the litigation tab from its own budget, it may be hesitant about withholding borderline information and forcing the press to challenge its action in court. Suggested addition to the

section: "Provided, in cases in which the press has substantially prevailed, the court shall assess such litigation costs against the government agency that initially refused to disclose the information."

(3) Time Factor. Section 552(a)(6)(A) of the Act requires each agency to act on requests for information within ten working days and to rule on appeals from initial adverse determinations within 20 working days. In cases of judicial review, section 552(a)(4)(C) calls for expediting FOIA cases. This is all well and good, but the press benefits little when agencies can stall for 30 working days after receipt of a request for information and then force the matter into the courts, where a final answer may not come for two or three years. While there is little that can be done to speed up the judicial process, the time period for agency response can be shortened when requests by the news media are involved. Further, the suggested amendment concerning litigation costs might deter the agencies from withholding certain material and necessitating a court fight.

Revising section 552(a)(6)(A) to require the agencies to respond to press requests within 24 hours and to limit appeal time to five days would greatly benefit the press. Such deadlines would not prove onerous for the agencies. Former Federal Energy Office Administrator William Simon once told journalists that:

> Within 24 hours of our receiving your requests for information, we will issue an acknowledgment, or grant the request. Within ten working days, I personally guarantee that you will get the information you seek, or have the opportunity to appeal. Appeals will be ruled upon within no more than ten days.[181]

And while Simon's time periods do not correspond exactly to those of the suggested amendment, they are considerably tougher than those in the present Act. As Senator Kennedy noted during consideration of the 1974 amendments, the FEO receives "an extraordinary number of inquiries,"[182] a fact that suggests other agencies would not be burdened by stricter deadlines. The suggested amendment would add subsection (iii) to section 552(a)(6)(A): "determine within 24 hours of receipt of a request for information by the press whether to comply with such a request, and make a determination with respect to any appeal within five working days after the receipt of such appeal."

(4) Exemption (4). Section 552(b)(4) of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The problem has been the meaning of confidential, and the present test is that the information is confidential only if disclosure would either "impair the Government's ability to obtain necessary information in the future" or" cause substantial harm to the competitive position of the person from whom the information was obtained."[183] An amendment to the statute adopting this test would benefit the press, so long as it made clear that disclosure to the press is allowable if such disclosure would not impair the government's ability to obtain the information. Such an amendment would recognize that there is a major difference in releasing specific, detailed information to a firm's competitor and in disclosing more general data to the press for purposes of informing the public. Thus, if the information is required by statute to be submitted to the government, it would be disclosable to the press, although perhaps in a more generalized form, and perhaps with certain identifying details deleted.

The problems in drafting such an amendment are considerable. Perhaps a statement of the above-quoted test would be required, followed by: "Disclosure to the press is required if the release of such information would not preclude the government from obtaining such information in the future."

(5) Exemption (6). Section 552(b)(6) of the Act exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The language itself suggests that warranted invasions are permissible, as are invasions that are not clearly unwarranted. One could argue that disclosure to the press is almost always warranted because of the "watchdog" function of the news media. The amendment suggested below would define "clearly unwarranted invasion" so as to allow disclosure to the press and deny it to requestors who seek to utilize the information for commercial purposes. This is similar to the approach taken by the New York statute.[184] Of course, even disclosure to the press at times might constitute an unwarranted invasion, so a provision should be made for a judicial balancing of interests involved.[185]

The suggested amendment, to be added after the existing language: "In general, disclosure of such information to the press shall not constitute an unwarranted invasion of personal privacy; however, the privacy interests of the individual(s) involved must be balanced with the public interest in disclosing the information, with the presumption in favor of disclosure to the press. Disclosure of such information for private, commercial or fund-raising purposes is specifically forbidden."

An alternative version of such an amendment might differentiate between "medical and personnel files" and "similar files," which the Supreme Court construed as the same in the Rose case.

III. CONCLUSION

Interpretation of the FOIA in such a manner as to create special treatment for the press seems unlikely. Moreover, definitive interpretations of certain sections of the Act are lacking, although the Supreme Court has recently provided some guidance in regard to exemption 6.[186] Amendment of the FOIA to create preferential press treatment also seems unlikely, since the Act was overhauled considerably in 1974. Indeed, many of the changes suggested in this paper would involve alteration of sections that were added or modified by the 1974 amendments.[187]

The press' greatest hope lies with the first amendment and the Supreme Court. It is safe to say that constitutional recognition of a right of special press access is preferable to creation of a statutory privilege -- what the Congress giveth, the Congress can taketh away. Although the Court has not spoken favorably of a right of special press access,[188] it is clear that the Court has not yet faced a situation in which both the public and the press are excluded from particular government information. Presented with such a case, one in which there are no alternative avenues of access, the Court will have to recognize a limited right of special press access if the first amendment is to continue to have meaning.[189] As the Court has consistently recognized, there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants."[190]

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FOOTNOTES

1. See Newsweek, Feb. 23, 1976, pp. 12-13, 49; Mar. 8, 1976, p. 55. Ironically, the incident occurred at approximately the same time President Ford was announcing his plans to regulate the intelligence community. Among his proposals was a statute making it a crime for anyone who has officially had government information to disclose it to others. See Lewis, "Making Leaks a Crime: Not a Simple Matter," New York Times, Feb. 22, 1976, § 4 at 1.

2. See generally Hulteng, The Messenger's Motives: Ethical Problems of the News Media (1976); Malloy, "Journalistic Ethics: Not Black, Not White, But a Rainbow of Gray," National Observer, July 26, 1975, at 1.

3. E.g., Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940). Lower courts also have recognized such a right. E.g., Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1181 (E.D. Pa. 1972); Burnham v. Oswald, 342 F. Supp. 880, 885 (W.D.N.Y. 1972).

4. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 U.S.L.W. 4686 (May 24, 1976), affirming 373 F. Supp. 683 (E.D. Va. 1974). The Court dealt primarily with the commercial speech doctrine in the case, but made clear that the first amendment protects recipients of information. However, the Court, in an opinion by Justice Harry Blackmun, did not go as far as the district court, which had stated that "the right to know is the foundation of the first amendment." 373 F. Supp. at 687. Justice Blackmun wrote: "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." 44 U.S.L.W. at 4688. The decision was 7-1, with Justice William Rehnquist dissenting and Justice John Paul Stevens not participating.

5. 417 U.S. 817 (1974).

6. 417 U.S. 843 (1974).

7. 408 U.S. 665 (1972).

8. Pell v. Procunier, 417 U.S. 843, 849-50 (1974).

9. As Justice Stewart said in an address at the Yale Law School:

> There is no constitutional right to have access to particular government information . . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution, in other words, establishes the contest, not its resolution.

Stewart, "Or of the Press," Yale Law School Sesquicentennial Address, Nov. 2, 1974, excerpted at 26 Hastings L.J. 631, 636 (1975); quoted with approval in United States v. Mitchell, 386 F. Supp. 639, 640 (D.D.C. 1975). See also Justice Stewart's opinion in Pell, 417 U.S. at 834.

10. See Note, 87 Harv. L. Rev. 1505, 1507 (1974).

11. As Justice Powell pointed out in his Saxbe dissent, the logical extension of the Court's reasoning is that nondiscriminatory denial of access to both the public and the press would be constitutionally permissible. 417 U.S. at 857.

12. Both cases involved press requests for interviews with specific prisoners in California and federal facilities. The Court held 5-4 that the first amendment does not mandate such access and noted that other avenues of access existed for the press, such as public tours, special press tours during which newsmen could talk with prisoners, correspondence with prisoners, and interviews with random groups of inmates selected by prison officials. Justice Stewart noted that the press enjoyed even greater access than the general public. Saxbe v. Washington Post Co., 417 U.S. 843, 849-50 (1974).

13. Comment, 124 U. Pa. L. Rev. 166, 191 (1975). Cf. Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973), in which the court stated in dictum that a limited right of special press access exists, thus allowing access to the press in situations where the public is legitimately excluded. See generally Comment, 53 Texas L. Rev. 1440 (1975); Note, 20 Villanova L. Rev. 189 (1974); Comment, 8 Harv. Civ. Rts.-Civ. Lib. L. Rev. 181 (1973).

14. 5 U.S.C. § 552 (1970), as amended, 5 U.S.C.A. § 552 (Supp. 1, Feb. 1975).

15. The term "press" as used herein refers to all news media, broadcast as well as print. This paper is based on the premise that such preferential treatment for the press, whether statutory or constitutional, is desirable. My views are set out in a forthcoming Journalism Quarterly article, Watkins, "Newsgathering and the First Amendment," (Autumn, 1976). Essentially, my position is that the press is specially equipped to collect, analyze, and disseminate information, to the benefit of the public. The press is the institution that vindicates the public's right to know. See Whalen, Your Right to Know (1973). And, it seems rather elementary that without a right to gather information, the rights of the press to publish and disseminate information is largely meaningless. See Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting). Unless the press can assert a right of special access when members of the general public are denied access, the public cannot receive the information it should and must have. Comment, 53 Texas L. Rev. 1440, 1480 (1975). Moreover, the public's reliance upon the press becomes greater as the complexity of society increases; thus, the need for a right of special access correspondingly becomes more acute. Finally, a special right of press access is necessary so the press can continue to perform its adversary role in relation to government. Cf. Rivers, The Adversaries: Politics and the Press (1970).

16. Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965); Red Lion Broadcasting Co. v. FCC, 395 U.S. 376, 390 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Stanley v. Georgia, 394 U.S. 557, 564 (1969).

17. Trimble v. Johnston, 173 F. Supp. 651, 656 (D.D.C. 1959). See, e.g., Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); Dayton Newspapers Inc. v. City of Dayton, 23 Ohio Misc. 49, 259 N.E.2d 522 (1970); New York Post Co. v. Moses, 23 Misc.2d 826, 204 N.Y.S.2d 44 (Sup. Ct. 1960), aff'd, 10 N.Y.2d 199, 176 N.E.2d 709, 219 N.Y.S.2d 7 (1961); Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

18. See, e.g., Holcombe v. State, 240 Ala. 590, 200 So. 739 (1941); Bend Publishing Co. v. Haner, 118 Ore. 105, 244 P.2d 868 (1926).

19. See, e.g., New York Post Co. v. Moses, note 17 supra; State ex rel. Beckley Newspapers Corp. v. Hunter, 127 W. Va. 738, 34 S.E.2d 468 (1945).

20. E.g., Minneapolis Star & Tribune Co. v. State, 163 N.W.2d 46 (Minn. 1971) (records of state board of medical examiners); Tennessean Newspapers Inc. v. Federal Housing Authority, 464 F.2d 657 (6th Cir. 1972) (name of FHA housing appraiser). For a discussion of press use of the federal Freedom of Information Act, see Jacqueney, "Nibbling at the Bureaucracy," [MORE], Oct. 1973 at 15.

21. Philadelphia Newspapers Inc. v. HUD, 343 F. Supp. 1176, 1181 (E.D. Pa. 1972). See also Cowles Communications Inc. v. Dept. of Justice, 325 F. Supp. 726 (N.D. Cal. 1971).

22. 94 F. Supp. 186 (D.R.I. 1950), aff'd on other grounds, 190 F.2d 760 (1st Cir.), cert. denied, 342 U.S. 894 (1951). According to one source, several earlier unreported cases involved first amendment access claims. Cross, The People's Right to Know, 125-28 (1953).

23. 173 F. Supp. 651 (D.D.C. 1959).

24. Id. at 656. See also New York Post Co. v. Moses, note 17 supra; Courier Journal and Louisville Times v. Curtis, 335 S.W.2d 934 (Ky. 1959), cert. denied, 364 U.S. 910 (1960).

25. 453 Pa. 147, 308 A.2d 888 (1973), appeal dism'd, 415 U.S. 970 (1974).

26. Pa. Stat. Ann. tit. 65, §§ 66.1 et seq. (1959).

27. 308 A.2d at 896.

28. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

29. Pell v. Procunier, 417 U.S. 817, 834 (1974).

30. In effect, the Court has simply linked together two unknowns, defining one in terms of the other. See Note, 87 Harv. L. Rev. 1505, 1507 (1974). And, as Justice Powell pointed out in his Saxbe dissent, the logical extension of the Court's reasoning is that nondiscriminatory denial of access to both the public and the press would be constitutional. 417 U.S. at 857.

31. See Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972); Martin v. City of Struthers, 319 U.S. 141 (1943).

32. See Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965).

33. See Note, 87 Harv. L. Rev. 1505 (1974); Note, 51 Chi-Kent L. Rev. 164 (1974).

34. See United States v. Marchetti, 466 F.2d 1309, 1315-16 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); Hearings on a Federal Public Records Law Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 3-35 (1965) (exploring the constitutional limitations on the FOIA created by the doctrine of executive privilege but not discussing a first amendment right to information).

35. Stewart, note 9 supra.

36. E.g., Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Associated Press v. United States, 326 U.S. 1, 20 (1945); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936); Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); Philadelphia Newspapers Inc. v. HUD, 343 F. Supp. 1176, 1181 (E.D. Pa. 1972); Burnham v. Oswald, 342 F. Supp. 880, 885 (W.D.N.Y. 1972).

37. See Consumers Union v. Periodical Correspondents Ass'n, 365 F. Supp. 18 (D.D.C. 1973); Quad City News Service Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Borreca v. Fasi, 369 F. Supp. 706 (D. Haw. 1974).

38. 334 F. Supp. 8 (S.D. Iowa 1971).

39. Iowa Code § 68A (1971).

40. 334 F. Supp. at 15.

41. Id. at 16.

42. 368 F. Supp. 768 (M.D. Ala. 1973).

43. Id. at 779. See Note, 20 Villanova L. Rev. 189 (1974).

44. See Cross, The People's Right to Know, 25-26 (1953); Thayer, Legal Control of the Press 169 (4th ed. 1962); Courier Journal and Louisville Times v. Curtis, 335 S.W.2d 934 (Ky. 1959), cert. denied, 364 U.S. 910 (1960).

45. Act of June 11, 1946, ch. 324 § 3, 60 Stat. 238.

46. United States ex rel. Stowell v. Deming, 19 F.2d 697 (D.C. Cir.), cert. denied, 275 U.S. 531 (1927).

47. 5 U.S.C. § 552 (1970), as amended, 5 U.S.C.A. § 552 (Supp. 1, Feb. 1975).

48. 5 U.S.C.A. § 552(a)(3) (Supp. 1, Feb. 1975).

49. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Supp. 1975).

50. Nader, Freedom from Information, 5 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1, 2 (1970).

51. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 804 (1967).

52. Hearings, March, 1972, House Foreign Operations and Government Information Subcommittee, pp. 1340-41, cited in Fader, The FOI Act and the Media, Freedom of Information Center Rep. No. 303 at 1 (May 1973). See also Final Report, The First Amendment and the News Media, Annual Chief Justice Earl Warren Conference on Advocacy (1973), at p. 68.

53. H.R. Rep. No. 1419, 92d Cong., 2d Sess. 1972.

54. Davis, note 51 supra, at 804. One commentator, in a seven-year assessment of the FOIA, stated: "The benefits of the Act have inured predominantly to private, not public, interests. It is the corporation seeking through disclosure an economic, competitive or legal advantage, not the common citizen seeking civic enlightenment, that has most often challenged wrongful agency withholding of public information." Note, 74 Colum. L. Rev. 895, 958 (1974). He added that corporations, whose needs are less evanescent, are less likely to be affected by the delay involved in seeking information, and that the public--outside of the news media--is simply not all that inquisitive. Id.

55. Davis, note 51 supra, at 803.

56. Hearings on H.R. 5425 and H.R. 4960 Before a Subcommittee of the House Committee on Government Operations, 93d Cong., 1st Sess. 46, 48 (1973). See also S. Rep. No. 854, 93d Cong., 2d Sess. (1974); Kohlmeier, The Journalist's Viewpoint, 23 Admin. L. Rev. 143 (1971).

57. Prior to the 1974 amendments, which require that any agency act upon a request within ten working days after receipt [5 U.S.C.A. § 552(a)(6)(A)(i)], considerable delay also occurred at the request level. Major government agencies took an average of 33 days to even respond to record request. S. Rep. No. 854, 93d Cong., 2d Sess. 24 (1974). Too often agencies realized that such delay can moot the story being investigated or ultimately blunt the reporter's desire to utilize the Act. "In the journalistic field," testified New York Times Vice-President Harding Bancroft, "stories that cannot be run when they are newsworthy often cannot be run at all." Id. at 23. See generally, Katz, Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 Texas L. Rev. 1261 (1970).

58. S. Rep. No. 854, 93d Cong., 2d Sess. 18 (1974).

59. 5 U.S.C.A. § 552(a)(6)(A) (Supp. 1, Feb. 1975).

60. Id. at § 552(a)(4)(D).

61. Id. at § 552(a)(4)(E).

62. Kohlmeier, The Journalist's Viewpoint, 23 Admin. L. Rev. 143, 144 (1971).

63. E.g., Tennessean Newspapers Inc. v. Federal Housing Authority, 464 F.2d 657 (6th Cir. 1972); Philadelphia Newspapers Inc. v. Dept. of HUD, 343 F. Supp. 1176 (E.D. Pa. 1972); Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973); Schechter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974). See generally Jacqueney, Nibbling at the Bureaucracy, [MORE], Oct. 1973 at 15; Archibald, The FOI Act Goes to Court, Freedom of Information Center Rep. No. 280 (April 1972).

64. For example, the Cleveland Plain Dealer acquired information regarding federal pardons, and Mississippi journalists received data on public welfare operations in the state. Hohenberg, The News Media: A Journalist Looks at His Profession 265 (1968).

65. New York Times, Nov. 10, 1974, at 1 col. 1.

66. New York Times, Nov. 14, 1974, at 16 col. 4.

67. New York Times, Nov. 18, 1974, at 1 col. 5.

68. Act of June 11, 1946, ch. 324 § 3, 60 Stat. 238.

69. Id.

70. Davis, note 51 supra, at 766.

71. H. Rep. No. 1497, 89th Cong. 2d Sess. (1966), 2 U.S. Code Cong. & Admin. News 2418 (1966) (emphasis supplied).

72. S. Rep. No. 813, 89th Cong. 1st Sess. 5-6 (1965) (emphasis supplied). See also Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June, 1967), reprinted in 20 Admin. L. Rev. 263 (1968).

73. Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 94 S.Ct. 1028, 1037 (1974).

74. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See also Sterling Drug Inc. v. FTC, 450 F.2d 698, 703 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 924 (1970); Ethyl Corp. v. EPA, 478 F.2d 47, 48 (4th Cir. 1973); LaMorte v. Mansfield, 438 F.2d 448, 451 (2d Cir. 1971); Kreindler v. Dept. of the Navy, 363 F. Supp. 611 (S.D. N.Y. 1973); Frankel v. SEC, 336 F. Supp. 675, 677 n.5 (S.D.N.Y. 1971), rev'd on other grounds, 460 F.2d 813 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), order stayed, 513 F.2d 430 (D.C. Cir. 1975); Benson v. General Services Administration, 289 F. Supp. 590 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969).

75. 467 F.2d 787 (6th Cir. 1972), subsequent opinion, 507 F.2d 481 (6th Cir. 1974).

76. 467 F.2d at 790 n.3.

77. Id. at 792 n.6.

78. 502 F.2d 133 (3d Cir. 1974).

79. 26 U.S.C. §§ 5041(a), (d); 5043(a), (b); 27 U.S.C. § 203(b)(1) contain the requirements, and 26 U.S.C. §§ 5661(a), 5687, and 27 U.S.C. § 207 provide criminal penalties for noncompliance. 26 U.S.C. § 5042(a)(2) excepts the "duly registered head of any family" who produces "for family use and not for sale an amount of wine not exceeding 200 gallons per annum." Registration procedures are listed in 29 C.F.R. §§ 240.540-43.

80. 502 F.2d at 134.

81. 363 F. Supp. 231, 234 (E.D. Pa. 1973).

82. Id. at 236.

83. 5 U.S.C. § 552(b)(6) (1970).

84. 502 F.2d at 136; accord, Rose v. Dept. of the Air Force, 495 F.2d 261 (2d Cir. 1974), aff'd, 44 U.S.L.W. 4503 (April 21, 1976); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 78 (D.C. Cir. 1974). Contra, Robles v. EPA, 484 F.2d 843 (4th Cir. 1973).

85. 502 F.2d at 137.

86. Id.

87. 450 F.2d 670 (D.C. Cir. 1971).

88. See note 84 supra.

89. See Stewart, note 9 supra.

90. 386 F. Supp. 639 (D.D.C. 1975).

91. Id. at 643.

92. 502 F.2d at 137. Cf. Rowan v. United States Post Office Dept., 397 U.S. 728 (1970).

93. 502 F.2d at 137.

94. In contrast to the provision in the federal act, the New York freedom of information statute defines as an unwarranted invasion of personal privacy the "sale or release of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial, or fund-raising purposes." N.Y. Pub. Officers Law § 88(3)(d) (McKinney, Supp. 1975).

95. 495 F.2d 261 (2d Cir. 1974), aff'd, 44 U.S.L.W. 4503 (April 21, 1976).

96. 484 F.2d 843 (4th Cir. 1973).

97. Id. at 847.

98. E.g., Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974); Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). For a discussion of the difficult problems involved with exemption 6, see Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975), in which the court analyzed Getman and its progeny but avoided a decision on the merits. See also Dept. of the Air Force v. Rose, 44 U.S.L.W. 4503 (April 21, 1976).

99. 44 U.S.L.W. 4503 (April 21, 1976).

100. 5 U.S.C. § 552(b)(4) (1970).

101. E.g., Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dism'd, 436 F.2d 1363 (2d Cir. 1971); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Brockway v. Dept. of the Air Force, 518 F.2d 1184 (8th Cir. 1975); National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

102. S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). See also S. Rep. No. 1219, 88th Cong., 2d Sess. (1964).

103. E.g., General Services Administration v. Benson, 415 F.2d 878, 881 (9th Cir. 1969); Consumers Union v. Veterans Administration, 301 F. Supp. 796, 803 (S.D. N.Y. 1969), appeal dism'd, 436 F.2d 1363 (2d Cir. 1971). See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

104. E.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 582 (D.C. Cir. 1970). See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

105. 498 F.2d 765 (D.C. Cir. 1974).

106. Id. at 770.

107. Note, 88 Harv. L. Rev. 470, 474 (1974).

108. Id. at 476.

109. Id. at 475-76.

110. Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Charles River Park "A" Inc. v. HUD, 519 F.2d 935, 940 (D.C. Cir. 1975). See also Ackerly v. Ley, 420 F.2d 1366 (1969). The courts have split over whether any agency is precluded by the FOIA from releasing information deemed to be within exemption 4 -- the so-called "reverse FOIA" suits. Compare Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) and Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974) with Charles River Park "A" Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975).

111. For an example of how a competitor performs such an analysis, see the testimony of an expert witness in Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246, 1251 (E.D. Va. 1974).

112. It can be argued that competitors could find out damaging information through the media recipient. While this is possible, it can be avoided by deleting identifying details in some situations, a practice utilized under exemption 6. See 5 U.S.C.A. § 552(a)(2)(C) (Supp. 1, Feb. 1975); National Prison Project of ACLU v. Sigler, 390 F. Supp. 789 (D.D.C. 1975). See also Dept. of the Air Force v. Rose, 44 U.S.L.W. 4503 (April 21, 1976).

113. Cf. Charles River Park "A" Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975), in which the court formulated such a balancing test for determing whether HUD abused its discretion in deciding to release information exempt from disclosure under exemption 4. The question involved was whether material exempt under the FOIA could nonetheless be disclosed by an agency. The court remanded the case for further proceedings in the district court because of an inadequate record.

114. S. Rep. No. 854, 93d Cong., 2d Sess. 11 (1974).

115. Id.

116. House Hearings on H.R. 5425 and H.R. 4960 Before a Subcommittee of the House Committee on Government Operations, 93d Cong., 1st Sess. 205 (1973).

117. See S. Rep. No. 854, 93d Cong., 2d Sess. 36 (1974).

118. S. Rep. No. 1200 (conference report), 93d Cong., 2d Sess. (1974), 3 U.S. Code Cong. & Admin. News 6285, 6287 (1974).

119. 120 Cong. Rec. S-9313 (daily ed. May 30, 1974) (remarks of Senator Kennedy).

120. 5 U.S.C.A. § 552(a)(4)(A) (Supp. 1, Feb. 1975).

121. 120 Cong. Rec. S-9316 (daily ed. May 30, 1974) (remarks of Senator Kennedy). Kennedy said:

> The press often has special problems with its need to obtain information in a timely manner, and testimony at our hearings reflected how delays in agency responses to press requests can particularly frustrate the operation of the Freedom of Information Act from its perspective. . . . . I believe that [the new provision] will assist the press in its efforts to obtain Government information.

122. S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974); 120 Cong. Rec. S-9316 (daily ed. May 30, 1974) (remarks of Senator Kennedy).

123. In discussing the "expedited handling" provision, Kennedy explained how the change would benefit the press but added that "it should also assist others who have a special need for expedited handling of their request, such as workers or public interest research groups requesting information relating to health and safety." 120 Cong. Rec. S-9316 (daily ed. May 30, 1974).

124. Robertson v. Butterfield, 498 F.2d 1031, 1034-35 (D.C. Cir. 1974), rev'd sub nom, FAA v. Robertson, 95 S. Ct. 2140 (1975). See also H. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966).

125. Tennessean Newspapers Inc. v. Federal Housing Authority, 464 F.2d 657, 661 (6th Cir. 1972).

126. See notes 56-62 and accompanying text.

127. N.Y. Pub. Officers Law §§ 85-89 (McKinney, Supp. 1975). For discussion of the New York act, see Marino, The New York Freedom of Information Law, 43 Fordham L. Rev. 83 (1974); Tiernan, New York's Access to Records Law, Freedom of Information Center Rep. No. 340 (July 1975).

128. N.Y. Pub. Officers Law § 88-1(g) (McKinney, Supp. 1975).

129. Section 99(3)(d) defines as an unwarranted invasion of personal privacy the "sale or release of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial, or fund-raising purposes."

Despite these provisions, one city administrator allowed a person to inspect dog license applications. Soon thereafter, the office received calls from people wanting to know why there were samples of dog food left on their porches. The administrator eventually was informed that the law provided a

basis for refusing to disclose information that is to be used for commercial purposes. Tiernan, New York's Access to Records Law, Freedom of Information Center Rep. No. 340 at 5 (July 1975).

130. Pa. Stat. Ann., tit. 62, § 404 (Supp. 1975); tit. 62, § 425 (1968). The state's "right to know" act excludes from the term "public record" any record to which access is prohibited or forbidden by statute. Pa. Stat. Ann., tit. 65, § 66.1(2). See McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973), appeal dism'd, 415 U.S. 970 (1974).

131. E.g., Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Supp. 1975); Ariz. Rev. Stat. Ann. § 39-121.01 (Supp. 1975); Ore. Rev. Stat. § 192.420 (1974).

132. E.g., Kan. Stat. Ann. § 45-201 (1973); Mont. Rev. Codes Ann. § 93-1001-4 (1964); Utah Code Ann. § 78-26-2 (1953).

133. E.g., Pa. Stat. Ann. tit. 65, § 66.2 (1959); Iowa Code Ann. § 68A.2 (1973); Mo. Stat. Ann. § 109.180 (1966).

134. Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Supp. 1975).

135. Tape recording of Senate debate, May 17, 1973, filed in Senate Media Services, room G-27, Texas State Capitol; transcript of House debate, Feb. 12, 1973, at 37-39. For an excellent legislative history of the Texas act, see Etnyre, The Texas Open Records Act: A History and Assessment (unpublished M.A. thesis, University of Texas at Austin, 1975).

136. 526 S.W.2d 211 (Tex.Civ.App.--Beaumont, 1975), writ filed.

137. 531 S.W.2d 177 (Tex.Civ.App.--Houston [14th Dist.], 1975), writ ref. n.r.e.

138. Open Records Dec. No. 108 (Aug. 5, 1975).

139. Acts of 1968, ch. 479.

140. Acts of 1973, ch. 461; Acts of 1974, ch. 332.

141. Va. Code Ann. § 21-342(a) (Supp. 1975).

142. One case has arisen under section 88-1(g), which provides for certain records to be available to "bona fide members of the news media," but the court merely followed the statutory language. No challenge to the special press treatment was made. Miller v. Village of Freeport, 81 Misc.2d 81, 365 N.Y.S.2d 445 (Sup. Ct. 1975).

143. Advisory Resolution No. 3, Bulletin of State of New York Committee on Public Access to Records (Oct. 11, 1974), quoted in Burke v. Yudelson, 81 Misc.2d 870, 368 N.Y.S.2d 779, 786-87 (Sup. Ct. 1975).

144. N.Y. Pub. Officers Law § 88(9) (McKinney, Supp. 1975). The committee also shall issue rules and regulations concerning the availability, location, and nature of records, as well as current lists of records which shall be produced. It also may recommend changes in the access law. Id.

145. Id. at § 88(3)(d).

146. McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973), appeal dism'd, 415 U.S. 970 (1974). In addition to interpreting the statutes in a highly technical manner, the court denied the newspaper access because it had not asserted any non-commercial or non-political use for the information requested. The court refused to "indulge in conjecture to conclude that once obtained, the information would be used solely by the newspaper, its individual appellee-editor, or reporter for non-commercial and non-political purposes." 308 A.2d at 893.

147. See note 30 supra.

148. 95 S.Ct. 1225 (1975).

149. Id. at 1228 n.2. See also Schlesinger v. Ballard, 95 S.Ct. 572 (1975); Jiminez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

150. 347 U.S. 497 (1954).

151. 347 U.S. 483 (1954).

152. 347 U.S. at 499. See also Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969).

153. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Schneider v. Rusk, 377 U.S. 163 (1964); Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973).

154. E.g., Railway Express Agency v. New York, 336 U.S. 106 (1949); Dandridge v. Williams, 397 U.S. 471 (1970); Reed v. Reed, 404 U.S. 71 (1971).

155. Shapiro v. Thompson, 394 U.S. 618, 638 (1969). This is commonly known as the two-tier equal protection analysis. See also Harper v. Board of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964). See generally, Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065 (1969); Gunther, In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

156. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973).

157. For example: the press serves as "representative of the public," as it is not bureaucratically feasible to allow total access to every citizen; as a practical matter, the general public must rely on the press to unearth relevant information; most citizens have neither the time nor training to acquire or interpret data; and a press privilege would fit hand-in-glove with the constitutional role of the news media.

Naturally, the "rational basis" test is much easier to meet. Cf. Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Los Angeles Free Press v. City of Los Angeles, 9 Cal.App.3d 448, 88 Cal. Rptr. 605 (1970), cert. denied, 401 U.S. 982 (1971).

158. E.g., Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973); Quad City Community News Service Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

159. Cf. Shapiro v. Thompson, 394 U.S. 618 (1969).

160. Note, 87 Harv. L. Rev. 1505, 1513 (1974).

161. Id. Of course, the editorial function of the press, which entails the decision of "what goes in the paper," is constitutionally protected. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).

162. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (picketing/speech).

163. 384 U.S. 641 (1966).

164. 79 Stat. 439, 42 U.S.C. § 1973b(e) (1970).

165. 394 U.S. 802 (1969).

166. Id. at 811.

167. See note 157 supra.

168. Cf. Saxbe v. Washington Post Co., 417 U.S. 843, 857 (Powell, J., dissenting) (suggesting that the logical extension of the Pell/Saxbe doctrine is that non-discriminatory denial of access to both public and press would be constitutionally permissible, a conclusion he finds unacceptable).

169. Blasi, Press Subpoenas: An Empirical and Legal Analysis 99-102 (1972). See also Wells, Criminal Sanctions Imposed Against Newsmen: Shield Protection Needed, 2 Am. J. Crim. L. 309 (1974).

170. Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

171. Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), rev'd sub nom, Branzburg v. Hayes, 408 U.S. 665 (1972).

172. In re Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970).

173. Blasi, note 169 supra, at 121. Blasi notes that reporters for powerful newspapers have a considerable advantage over newsmen for papers with little political clout, and that certain reporters--especially those from influential news organizations--have access to leaks and briefings not available to the press at large. Id. It seems unlikely, however, that a mere definition could change the basic competitive nature of the news business.

174. Comment, 8 Harv. Civ. Rts.-Civ. Lib. L. Rev. 181, 194 (1973).

175. Los Angeles Free Press v. City of Los Angeles, 9 Cal.App.3d 448, 88 Cal. Rptr. 605 (1970), cert. denied, 401 U.S. 982 (1971). But see Quad City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

176. See 39 C.F.R. § 132.2 (1974).

177. E.g., Tex. Rev. Civ. Stat. Ann. art. 28a(2) (1969).

178. See note 15 supra.

179. See text accompanying notes 70-72 supra.

180. Other amendments might prove helpful. For example, the Fourth Circuit's decision in Alfred A. Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975), cert. denied, 95 S.Ct. 1999 (1975), substantially gutted improvements made in exemption 1 (classified documents) by the 1974 amendments. A new amendment eliminating the Colby "presumption of regularity" test in determining whether classified documents were in fact properly classified is necessary to make the 1974 amendment to exemption 1 meaningful once again.

181. S. Rep. No. 854, 93d Cong. 2d Sess. 26 (1974).

182. Id.

183. National Parks & Conservation Ass'n v. Mortion, 498 F.2d 765, 770 (D.C. Cir. 1974). See text accompanying notes 103-09 supra.

184. See note 94 supra.

185. See text accompanying notes 94-99 supra. In Dept. of the Air Force v. Rose, 44 U.S.L.W. 4503 (April 21, 1976), the Supreme Court upheld the balancing approach as well as in camera examination of documents by the district judge to balance individual privacy and public access to information.

186. Dept. of the Air Force v. Rose, 44 U.S.L.W. 4503 (April 21, 1976), affirming 495 F.2d 261 (2d Cir. 1974).

187. E.g., fee waiver, section 552(a)(4)(A); litigation costs, section 552(a)(4)(E); time requirements, section 552(a)(6)(A).

188. Branzburg v. Hayes, 408 U.S. 665 (1972); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

189. Saxbe v. Washington Post Co., 417 U.S. 843, 857 (1974)(Powell, J., dissenting). See notes 13 and 15 supra.

190. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

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